

determining Contractor's Payment to the extent of the excess. Contractor may present evidence demonstrating that those wages are reasonable notwithstanding their being in excess of prevailing wage rates.

6.17 Operations Audits

In addition to City's rights under Sections 6.03 and 6.04, City may conduct, at its expense, detailed audits of Contractor's operations utilizing either or both its own employees and independent consultants. Contractor will cooperate with City and its consultants in those audits. If cooperation entails efforts by Contractor beyond those that are required under Sections 6.03 and 6.04, Contractor may notify City and City will reimburse Contractor for the reasonable cost of Contractor's additional efforts.

ARTICLE 7 FRANCHISE FEE

7.01 Amount

A. For the 12-month period commencing July 1, 2004 and ending June 30, 2005 and each corresponding 12-month period thereafter, Contractor will pay to City, as partial consideration for the rights and privileges accorded by the franchise granted to it by City, a Franchise Fee equal to \$1,454,319.36.

B. City may, in its sole discretion, increase the Franchise Fee to an amount larger than that provided for in the preceding paragraph. If City elects to increase the Franchise Fee, the increase will become effective on the immediately following July 1, and Contractor's Payment will be adjusted accordingly.

C. The Franchise Fee will be adjusted annually in the manner set forth below to reflect changes in the San Francisco-Oakland-San Jose Metropolitan Area Consumer Price Index (Urban Wage Earners and Clerical Workers; 1982-84 = 100) compiled and published by the United States Department of Labor, Bureau of Labor Statistics (the "**Index**"). The Franchise Fee will be adjusted for FY 2005-2006 by 100% plus the percentage increase in the Index level from April 2004 to December 2004, and for fiscal years after FY 2005-2006, the change in the Index between the December immediately preceding the commencement of

the fiscal year and the Index as of the prior December.

For example, the Index as of April 2004 was 194.7. The Franchise Fee for 2005-2006 will be adjusted by multiplying \$1,454,319.36 (the Franchise Fee for Fiscal Year 2004-2005) by 100% plus the percentage change in the Index from April 2004 to December 2004. The Franchise Fee for FY 2006-2007 will be adjusted by multiplying the Franchise Fee for Fiscal Year 2005-2006 by 100% plus the percentage change in the Index between December 2004 and December 2005. The Franchise Fee will be adjusted in a similar manner by changes in the Index from December to December for subsequent years.

D. The full amount of the Franchise Fee is an operating expense when computing Contractor's Payment, but the Franchise Fee is subtracted from the Projected Annual Cost of Operations in order to determine profit under Section 8.03Ab2

7.02 Time and Method of Payment

Contractor will pay the Franchise Fee in the following manner. City will deduct 1/12th of the annual Franchise Fee from the monetary payments otherwise due to Contractor from City under Section 8.03, provided that City is billing substantially all Waste Generators as contemplated by Section 6.01 and that Contractor is providing solid waste collection service.

If Contractor is not providing solid waste collection service although this Franchise and Agreement have not been terminated and City has had to undertake other arrangements for that service pursuant to Article 10, Contractor will pay the Franchise Fee in equal monthly installments of 1/12th of the annual Franchise Fee, in cash, on the first day of each month that it is not providing solid waste collection services. City may recover those Franchise Fee payments from any performance bond, letter of credit or other performance assurance provided by Contractor under this Agreement.

ARTICLE 8 COMPENSATION

8.01 General

The "Contractor's Payment" provided for by this Article is the full, entire and complete compensation due to Contractor from City for furnishing all labor, equipment, materials and

supplies and other things necessary to perform all the services required by this Agreement in the manner and at the times prescribed. Contractor's Payment includes all costs for the items mentioned above and also for all taxes, insurance, bonds, overhead, profit and all other costs necessary to perform the services in accordance with this Agreement.

8.02 City Approval of Capital Expenses

Contractor will obtain City approval prior to making any capital investment in excess of \$50,000 if that investment has not previously been included in Contractor's Payment.

8.03 Contractor's Payment

Contractor's compensation ("Contractor's Payment") will be determined as described below.

[8.03]A. Determination of Contractor's Payment for Fourteenth Year (July 1, 2004-June 30, 2005) and Subsequent Periods

Contractor's Payment for subsequent years of the Franchise, commencing with the Fourteenth Year of the Term beginning on July 1, 2004, is determined as follows:

[8.03A]1. General. On or before January 31, 2004, and on or before each January 31 of each succeeding calendar year of the Term, Contractor will submit a **Request for Calculation of Contractor's Payment** covering the following year of the Term. For example, in January 2004, Contractor will submit a request covering Year Fourteen that begins on July 1, 2004. This request will be based on the audited financial statement submitted under Section 8.07.F for the preceding fiscal year, in the format specified by City and organized so as to facilitate the calculations required by this Section, follow the Chart of Accounts in Exhibit 8.03A1, and be accompanied by (1) such supporting schedules as deemed necessary by City and (2) a statement signed by the President or Vice President, if available (and if neither is available by the Administrative Officer) and the Chief Financial Officer of Contractor that as of the date of submission, the financial information submitted is complete and correct to the best of their knowledge and belief.

[8.03A]2. Determination of Contractor's Payment for the Fourteenth Year of the Term. Contractor's Payment for Year Fourteen consists of:

- (1) the "Projected Cost of Operations for Year Fourteen" (PAC06) calculated as set forth in the following paragraph Section 8.03Ab, *plus*
- (2) profit for Year Fourteen (P6) calculated as set forth in the next succeeding paragraph (Section 8.03A2b).

[8.03A2]a. Projected Cost of Operations". Projected Cost of Operations for Year *Fourteen*" consists of the sum of:

Projected Labor-Related Costs (PL6);
Projected Vehicle-Related Costs (PV6);
Projected Other Costs (P06); and
Projected Net Interest Expense and
Depreciation Expense (NID6)

Each of these projected costs and expenses is corroborated, adjusted and escalated/projected as provided in Exhibit 8.03A.

[8.03A2]b. Profit. Profit for Year *Fourteen* is calculated as follows:

The Franchise Fee payable under Section 7.01C is subtracted from the Projected Annual Costs of Operations for Year *Fourteen* (PAC014), and the difference is the "Net Cost for Year *Fourteen*" ("NC14").

Profit for Year *Fourteen* equals the quotient of NC14 divided by nine hundred and fifteen one-thousandths (0.915), less NC14. That is,

Profit (PAC014-Fr. Fee Yr 14)
Year *Fourteen*= ----- - (PAC014-Fr.Fee Yr
14)
0.915

[8.03]A. Incentive Payments. Any incentive payments allowed in accordance with Exhibit 8.03D are added to Contractor's Payment.

[8.03]B. Determination of Contractor's Payment for Fourteenth and Following Years. Contractor's Payment for the

Fourteenth Year of the Term and each year of the Term thereafter is determined following the same procedure as described in Section 8.03A, except that references to Year *Fourteen* will refer to the year for which Contractor's Payment is being calculated and references to Years Twelve and Thirteen will refer to the 2 years of the Term immediately preceding the year for which Contractor's Payment is being calculated.

[8.03]C. Variances from Projections.

1. Subject to Section 8.03C2, Section 8.03D and Section 8.06B below, Contractor will retain any income from actual costs during any year being less than those projected for that year when establishing Contractor's Payment for that year, *except* with respect to reconciliation of the following costs:

(1) actual / projected capitalized maintenance costs in Section C2d of Exhibit 8.03A, and

(2) actual costs of interest and depreciation described in Section C4 ("Reconciliation plus Projection of Net Interest and Depreciation Expense") of Exhibit 8.03A.

Similarly, except for the preceding two items, Contractor will not be compensated for actual costs during any year being greater than those projected for that year when establishing Contractor's Payment for that year. In addition, except for those preceding two items, calculations of Contractor's Payments for future years will not attempt to adjust for past variances of actual costs from those that had been projected. However, City may reduce Contractor's Payments to recoup prior overpayments due to subsequently discovered fraud or misrepresentation in financial data submitted by Contractor to City.

[8.03]2. Notwithstanding the prior Subparagraph 8.03C1, adjustments will take into account the effect of extraordinary, uncontrollable changes in the cost of performance. To that end, and in the limited circumstances described in this Subparagraph 8.03C2, Contractor's Payment may be adjusted to reflect changes in cost between those projected in calculating Contractor's Payment and those actually incurred.

Contractor's Payment will be increased or decreased to the extent that a specific cost, incurred in the prior year, over which Contractor could not have exerted control, differs from the projected change in the amount of the

cost by twice the projected change in the cost and the aggregate of all such increases and/or decreases equals or exceeds 5% of Contractor's Payment in the prior year. That adjustment will be made in the year following the year in which the difference occurred. The full amount of the difference will be accounted for if the 5% threshold is reached.

[8.03C]3. The adjustments contemplated by this Subsection 8.03C are entirely distinct from the cost control incentive program described in following Subsection 8.03D.

[8.03]D. Incentive Program. Commencing with Year Fourteen of the Term and for each year thereafter, Contractor's Payment will be determined in accordance with the Incentive Program described in Exhibit 8.03D.

[8.03]E. Schedule. Contractor will submit its Request for Determination of Contractor's Payment on or before the January 31 that immediately precedes the commencement of the year with respect to which the calculation is to be performed. City will use its best efforts to make the adjustment effective by July 1 of the same year. However, City will not make any retroactive adjustment to compensate for any delay in determining Contractor's Payment that results from the failure of Contractor to respond promptly and completely to requests of City for information related to any of the determinations required by this Section.

8.04 Time of Payment

City will pay Contractor's Payment determined under Section 8.03, reduced by the offsets under Section 8.05, (and adjusted, if appropriate, under Section 8.06) in monthly installments on the 25th day of each month, for service rendered the preceding month.

8.05 Offsets to Contractor's Payment

Contractor's Payment made each month is reduced by the sum of the following:

. 1/12th of the Franchise Fee due to City under Section 7.01.

. The billings issued and cash received for services

provided by Contractor under Section 6.01B and billed directly by Contractor during the preceding month.

Liquidated Damages, if any, due under Section 6.07 for failure to achieve the performance standards during the preceding month.

8.06 Adjustments for Changes

A. General. If City has directed a change in scope of work under Section 6.09 and either party believes that the change will increase or decrease the costs of providing service, the party that believes Contractor's Payment should be adjusted will within 30 calendar days submit to the other party a proposed adjustment and the parties will thereafter meet and discuss the matter. Contractor will promptly provide all relevant schedules, supporting documentation and other financial information requested by City to evaluate the necessity for an adjustment and the amount thereof. City's Director of Public Works will participate in key meetings regarding those adjustments.

Pursuant to a recommendation from the Director of Public Works, within 90 days of the submission of the Proposed Adjustment City will determine the amount of the adjustment, if any, and will thereafter adjust Contractor's Payment accordingly. Any adjustments are effective as of the date the change in service is implemented.

If Contractor is dissatisfied with the recommendation of the Director of Public Works it may appeal that decision to City Manager. If an appeal is to be taken, Contractor will promptly (and in any case within 15 days of its receipt of the Director of Public Works decision) submit a full written statement of the following:

- (1) each item with which it disagrees;
- (2) the reasons for its disagreement;
- (3) the amount which it believes Contractor's Payment should be adjusted for each of those items.

Contractor will submit copies of all financial and operational data on which it relies. The City Manager will meet with Contractor to review the appeal and will issue his or her decision (increasing or decreasing the amount of the recommended adjustments) within 30 days after receipt of Contractor's

complete appeal.

If Contractor is dissatisfied with the City Manager's decision, it may appeal that decision to the City Council. If an appeal is to be taken, Contractor will promptly (and in any case within 15 days of its receipt of the City Manager's decision) submit to the City Clerk (with a copy to the City Manager and the City Attorney) a full written statement in the same form as prescribed above. The City Council will consider the appeal at a public meeting held within 60 days after the filing of Contractor's appeal.

B. Adjustments for Specific Changes in Year Fifteen.

Contractor may incur \$92,412 additional operating and capital costs, beginning in Year 15, in order to comply with the newly amplified performance specifications and standards prescribed in the following provisions of this Restated Agreement:

5.11A (Care of Private and City Property)
5.15C (Cleaning, Painting, Maintenance)
5.16F (Employee Conduct and Courtesy; Training)
6.05D (Telephone)
6.05F (E-mail Access)
6.15 (Audit of City Billings).

Contractor's projection of these \$92,412 additional capital and operating costs, as shown on Exhibit 8.06B, will be paid to Contractor in 12 monthly installments as part of the Contractor Payment for Year 15.

When it prepares its Contractor Payment Request for Year 16, Contractor will reduce that request to the extent, if any, that the sum of the actual costs of items listed in Exhibit 8.06B is less than the sum of the projected costs of those items.

8.07 Maintenance of Financial Records

A. General. In order to effectuate the periodic reviews of Contractor's Payment contemplated by Section 8.03 and the occasional reviews of adjustments under Section 8.06 due to changes directed by City, which reviews do not necessarily coincide with the periodic reviews under Section 8.03, Contractor must maintain accurate, detailed financial information in a consistent format and to make such information available to City in a timely fashion. In order to assure the public of the accuracy of the review processes, Contractor's

financial records must be confirmed by an audit conducted by an independent certified public accountant whose report thereon is forwarded to City on a regular basis. This section is intended to effectuate these requirements.

B. Contractor's Accounting Records. Contractor will maintain in its office accurate and complete accounting records containing the underlying financial and operational data relating to, and the bases for computation of, all costs associated with providing service under this Agreement. Contractor will prepare or cause to be prepared the accounting records on an accrual basis, in accordance with Generally Accepted Accounting Principles consistently applied. Contractor will adhere throughout the Term to "Generally Accepted Accounting Principles" then in effect, published by the American Institute of Certified Public Accountants.

Contractor's operating year for both accounting and all other record keeping purposes must be the Fiscal Year.

C. Inspection of Records. City, and auditors and other agents selected by City, may, during regular business hours, conduct onsite inspections of the records and accounting systems of Contractor and make copies of any documents relevant to this Agreement, including records and accounting systems with respect to subscriptions and services billed by City, rear-yard services and roll-off services billed by Contractor.

D. Retention of Records. Contractor will retain all records and data required to be maintained under this Agreement for a period of at least 3 years following the close of each of Contractor's fiscal years, and for such further time as may be designated by City to enable it to complete any review or audit commenced during that 3-year period.

E. Delivery of Financial Reports to City. Contractor will deliver to City the financial reports, in the format and at the time required by Section 8.03E.

In addition, Contractor will provide City with financial information in such format, and at such times, as City may reasonably require in order to monitor Contractor's financial activities and conduct the compensation review processes described in this article.

F. Delivery of Financial Statements, Other Documents, and Auditor's Report. Within 120 days after the

close of each fiscal year (i.e., by October 28) Contractor will deliver to City 8 copies of its audited financial statements for the preceding fiscal year together with such other documents as may be required by City which show in detail the financial condition of Contractor and the results of its operations under this Agreement. These statements must have been examined by an independent certified public accountant and be accompanied by the accountant's report containing (1) the accountant's representation that it has examined Contractor's financial statements in accordance with Generally Accepted Auditing Standards and (2) the accountant's unqualified opinion that such statements have been prepared in accordance with Generally Accepted Accounting Principles consistently applied and fairly reflect the results of operations and Contractor's financial condition.

At the same time that Contractor delivers its accountant's representation and opinion, Contractor will also deliver:

- audited consolidated financial statements of Contractor's ultimate parent company (if any) for such fiscal year, together with the related opinion of the independent certified public accountant that examined those financial statements.

- a statement disclosing whether any of Contractor's subcontractors or suppliers are subsidiaries, or otherwise affiliates, of Contractor or Contractor's parent company or companies.

City may prescribe the contents of supplemental schedules to be included with the financial statements required.

G. Affiliates. Contractor will maintain its accounting records on a basis showing the results of Contractor's operations under this Agreement separately from operations in other locations, as if Contractor were an independent entity providing service only to City. Contractor must not combine, consolidate or in any other way incorporate its costs and revenues associated with providing service to City with costs and revenues associated with other operations conducted by Contractor in other locations, or with those of Affiliates.

Whether or not there are contractual or extra-contractual

relationships between Contractor and Affiliates, if Contractor is owned or controlled by another corporation, then the financial reports and auditor's opinions required of such Contractor are also required of such "parent company" which constitutes an "Affiliate" for purposes of this Section.

H. Definition of "Affiliate". For purposes of this Agreement, all businesses, (including corporations, limited and general partnerships and sole proprietorships) that are directly or indirectly related to Contractor by virtue of direct or indirect ownership interests or common management are deemed to be "affiliated with" Contractor and included within the term "Affiliates" as defined and used in this Agreement. An Affiliate includes a business in which Contractor owns a direct or indirect ownership interest, a business that has a direct or indirect ownership interest in Contractor and/or a business that is also owned, controlled or managed by any business or individual who has a direct or indirect ownership interest in Contractor. For purposes of determining whether an indirect ownership interest exists, the constructive ownership provisions of Section 318(a) of the Internal Revenue Code of 1986, as in effect on the date of this Agreement, applies; provided, however, that (i) "10 percent" is substituted for "50 percent" in Section 318(a)(2)(C) and in Section 318(a)(3)(C) thereof; and (ii) Section 318(a)(5)(C) is disregarded. For purposes of determining ownership under this paragraph and constructive or indirect ownership under Section 318(a), ownership interests of less than 10 percent is disregarded and percentage interests is determined on the basis of the percentage of voting interest or value that the ownership interest represents, whichever is greater.

I. Review of Audited Financial Statement. With its own employees or by means of a consultant, City may review the audit plan and work papers of any of the independent certified public accountants who give opinions on the audited financial statements that Contractor must furnish pursuant to Section 8.07.F. and G. If that review gives rise to any questions, or differences of opinion regarding Contractor's compliance with this Agreement, Contractor and its accountant(s) will meet with City and its consultant, if any, to answer those questions and to discuss the differences of opinion.

ARTICLE 9 INDEMNITY, INSURANCE, BOND

9.01 Indemnification

Contractor indemnifies and holds harmless City, its officers, employees, agents and volunteers, from and against any and all loss, liability, penalty, forfeiture, claim, demand, action, proceeding, suit or enquiry of any and every kind and description (including injury to and death of any person and damage to property or for contribution or indemnity claimed by third parties) ("**Liabilities**") arising or resulting from and in any way connected with the following:

(1) the negligence or willful misconduct of Contractor, its officers, employees, agents, volunteers and/or subcontractors in performing services under this Agreement;

(2) the failure of Contractor, its officers, employees, agents, volunteers and/or subcontractors to comply in all respects with the provisions of this Agreement, applicable laws (including the Environmental Laws) and regulations, and/or applicable permits and licenses; and/or

(3) the acts of Contractor, its officers, employees, agents, volunteers and/or subcontractors in performing services under this Agreement for which strict liability is imposed by law (including the Environmental Laws).

This indemnity applies regardless of whether the Liabilities are also caused in part by the negligence of others, including that of any of the indemnitees; provided, however, that this indemnity does not apply if the loss or damage to a third party resulted from an act or omission of Contractor, its officers, employees agents and volunteers, which act or omission is solely the result of its or their following a negligent, express direction or order of an officer, employeeagent or volunteer of City. Contractor's indemnification described in this Section is intended to operate as an agreement pursuant to 42 U.S.C. Section 9607(e) and California Health and Safety Code Section 25364, to insure, protect, hold harmless and indemnify City from Liabilities.

Upon demand of City, at Contractor's sole cost and expense Contractor will defend (with attorneys acceptable to City) City, its officers, employees, agents and volunteers against any claims, actions, suits or other proceedings, whether judicial, quasi-judicial or administrative in nature, arising or resulting from any events described in the immediately preceding paragraph.

Contractor's duty to indemnify and defend survives the expiration or earlier termination of this Agreement.

9.02 Insurance

A. Types and Amounts of Coverage. At Contractor's sole cost and expense, Contractor will procure and maintain in force at all times during the Term the following types and amounts of insurance.

1. Workers' Compensation and Employer's Liability. Contractor will maintain workers' compensation insurance covering its employees in statutory amounts and otherwise in compliance with the laws of the State of California. Contractor will maintain Employer's Liability insurance in an amount not less than \$1 million per accident or disease.

2. Public Liability. Contractor will maintain comprehensive general liability insurance with a combined single limit of not less than \$10 million per occurrence and \$10 million aggregate covering all claims and all legal liability for personal injury, bodily injury, death, and property damage, including the loss of use thereof, arising out of, or occasioned in any way by Contractor's performance of, or its failure to perform, services under this Agreement. Contractor will report to City the occurrence of any personal injury to third parties within 8 Working Hours thereof, and any property damages in the next monthly report submitted in accordance with Section 6.03.

The insurance required by this subsection includes:

- a. Premises Operations;
- b. Independent Contractor's Protective;
- c. Products and Completed Operations;
- d. Personal Injury Liability with Employment Exclusion deleted;
- e. Broad Form Blanket Contractual, including Contractor's Obligation under Section 9.01;

f. Automobile Liability that includes Owned, Non-Owned, and Hired Motor Vehicles;

g. Broad Form Property Damage, including Completed Operations.

3. Physical Damage. Contractor will maintain comprehensive (fire, theft and collision) physical damage insurance covering the vehicles and equipment used in providing service to City under this Agreement, with a deductible or self-insured retention not greater than \$1,000.

The insurance policies required by this Section must be issued by an insurance company or companies authorized to do business in the State of California with a rating in the most recent edition of Best's Insurance Reports of size category XV or larger and a rating classification of A or better, except that Workers' Compensation insurance must be provided by a carrier with a size category of VIII or larger.

B. Required Endorsements

1. The Workers' Compensation policy must contain an endorsement in substantially the following form:

"Thirty (30) days prior written notice shall be given to the City of Sunnyvale in the event of cancellation reduction in coverage, or non-renewal of this policy. Such notice shall be sent to:

City Manager
City of Sunnyvale
456 W. Olive Avenue
Sunnyvale, CA 94086"

2. The Public Liability policy must contain endorsements in substantially the following form:

(a) "Thirty (30) days prior written notice shall be given to the City of Sunnyvale in the event of cancellation, reduction of coverage, or non-renewal of this policy. Such notice shall be sent to:

City Manager
City of Sunnyvale
456 W. Olive Avenue
Sunnyvale, CA 94086

(b) "The City of Sunnyvale, its officers, employees, agents and volunteers are additional insureds on this policy."

(c) "This policy shall be considered primary insurance as respects any other valid and collectible insurance maintained by the City of Sunnyvale, including any self-insured retention or program of self-insurance, and any other such insurance shall be considered excess insurance only."

(d) "Inclusion of the City of Sunnyvale as an insured shall not affect the City's rights as respects any claim, demand, suit or judgment brought or recovered against Contractor. This policy shall protect Contractor and the City in the same manner as though a separate policy had been issued to each, but this shall not operate to increase the company's liability as set forth in the policy beyond the amount shown or to which the company would have been liable if only one party had been named as an insured."

C. Delivery of Proof of Coverage. Contractor will furnish the City with certificates of insurance and additional insured endorsements for all insurance coverage required hereunder, in form and substance satisfactory to City. Certificates must show the type and amount of coverage, effective dates and dates of expiration of policies and have all required endorsements. If City requests, Contractor will promptly deliver to City copies of each policy, together with all endorsements.

Contractor will furnish renewal certificates of insurance and additional insured endorsements periodically and at least annually to City to demonstrate maintenance of the required coverage throughout the Term.

D. Other Insurance Requirements

1. If Contractor delegates any services to a subcontractor, Contractor will require its subcontractor to provide statutory workers' compensation insurance and employer's liability insurance for all of the subcontractor's employees engaged in the work. The liability insurance required by subsection 9.02.A.2 must cover all subcontractors, or the subcontractor must furnish evidence of insurance provided by it meeting all of the requirements of this Section 9.02.

2. Contractor will comply with all requirements of the insurers issuing policies. Carrying insurance does not relieve Contractor from any obligation under this Agreement. If any claim is made by any third person against Contractor or any subcontractor on account of any occurrence related to this Agreement, Contractor will promptly report the facts in writing to the insurance carrier and to City.

If Contractor fails to procure and maintain any insurance required by this Agreement, City may take out and maintain, at Contractor's expense, such insurance as it may deem proper and deduct the cost thereof from any monies due Contractor.

The Public Liability insurance required by Section 9.02.A.2 must be written on an "occurrence," rather than a "claims made" basis, if such coverage is obtainable. If it is not obtainable, Contractor must arrange for "tail coverage" to protect City from claims filed after the expiration or termination of this Agreement relating to incidents that occurred prior to such expiration or termination.

9.03 Faithful Performance Bond

Throughout the Term, Contractor must file with City and continue to maintain for the benefit of City, a bond securing Contractor's faithful performance of its obligations under this Agreement. The principal sum of the bond must be \$3 million. The form of the bond must be as set out in Exhibit 9.03. The bond must be executed as surety by a corporation authorized to issue surety bonds in the State of California, with a financial condition and record of service satisfactory to City.

Contractor will, if requested by City, procure and file a replacement performance bond in the same form as Exhibit 9.03, in the 16th and 26th years of the Term. The amount of the bond,

if required, must be \$3 million multiplied by a fraction, the numerator of which is Contractor's Payment in the 15th or 25th years, respectively, of the Term and the denominator of which is Contractor's Payment in the first year of the Term. Prior to requesting an increase in the \$3 million performance bond, City will discuss the request with Contractor, recognizing that bond markets have a tendency to change with respect to accessibility and cost.

In lieu of a performance bond, City and Contractor may agree that Contractor will provide for the issuance of an irrevocable stand by letter of credit (the "**Letter of Credit**") by a bank approved by City in its sole discretion (the "**Bank**") for the benefit of City. Under the Letter of Credit, City may draw, in one or more drawings, an aggregate amount up to \$2 million (the "**Stated Amount**") upon the occurrence of (1) an Event of Default defined in Section 11.01, (2) Contractor's failure to timely pay any moneys due City, (3) Contractor's inability to regularly pay its bills as they become due, or (4) Contractor's failure to timely pay any solid waste management facility for recyclables processing, composting or disposal services provided under this Agreement, as evidenced to the satisfaction of City. City and Contractor may agree that Contractor will increase the aggregate amount of the Letter of Credit in conjunction with determination of Contractor's payment in accordance with Section 8.03. Any incremental costs or savings incurred by Contractor to secure the increased aggregate amount will be included in the calculation of Contractor's payment for the next rate year. The expiration date of the Letter of Credit must be no less than the term of this Agreement provided in Section 4.02 (the "**Stated Expiration Date**"), unless it provides that it will not be terminated, modified or not renewed except after prior written notice by certified mail, return receipt requested, to City 60 days in advance or termination or failure to renew. The Letter of Credit may expire on the date on which the Bank receives a certificate from City saying that the term has expired or this Agreement has been terminated and Contractor owes City no money under this Agreement or that Contractor has substituted an alternative letter of credit or other security document acceptable to City in City's sole discretion. The form of the Letter of Credit, including the procedures for and place of demand for payment and drawing certificate attached thereto, is subject to approval of City in its sole discretion. The Letter of Credit must be transferable to any successor or assignee of City.

ARTICLE 10 CITY'S RIGHT TO PERFORM SERVICE

10.01 General

A. City Rights. If Contractor, for any reason whatsoever, fails, refuses or is unable to collect and transport any or all Solid Waste that it is required by this Agreement to collect and transport, at the time and in the manner provided in this Agreement, for a period of more than 48 hours, then upon notice to Contractor, City may take the following action or actions:

- (1) perform, or cause to be performed, such services itself with its own or other personnel without liability to Contractor and/or
- (2) take possession of any or all Service Assets and to use those Service Assets to collect and transport any Solid Waste generated within City.

If City exercises this right to use and possession of those Service Assets, Contractor will furnish City with immediate access to all of its business records related to all Waste Generator subscription (including service and complaint information), routing, and its billing of accounts for services that are not billed by City under Section 6.01A. Contractor hereby gives all Waste Generators the right to use and possession of Containers theretofore provided by Contractor or thereafter distributed by City or City's representative, which right of Waste Generators to use and possession may be exercised only in the event City exercises its right to use and possession. A copy of the Vehicle Lease under which Contractor leases to City vehicles to provide solid waste collection and disposal services is attached as Exhibit 10.01.

In that event Contractor will:

- (1) fully cooperate with City to effect the transfer of possession of property to City for City's use.
- (2) if City so requests, keep in good repair and condition all of such property, provide all motor vehicles with fuel, oil and other service, and provide such other service as may be necessary to maintain said property in operational condition.
- (3) allow City to immediately engage all or any Contractor personnel necessary or useful for the collection

and transportation of Solid Waste, including, if City so desires, employees previously or then employed by Contractor. If City so requests, Contractor will further furnish City the services of any or all management or office personnel employed by Contractor whose services are necessary or useful for Solid Waste collection and transportation operations.

City's exercise of its rights under this Article 10

- (1) does not constitute a taking of private property for which compensation must be paid,
- (2) does not create any liability on the part of City to Contractor, and
- (3) does not exempt Contractor from the indemnity provisions of Section 9.01, which are meant to extend to circumstances arising under this Section, provided that Contractor is not required to indemnify City against claims and damages arising from the sole negligence of City officers, employees and agents in the operation of Service Assets during the time City has taken possession of those Service Assets.

B. Service Asset Documentation. Any document ("Service Asset Document"), entered into after the date Contractor executes this Extended and Second Restated Agreement including

- (i) subscription and routing software and
- (ii) a lease, financing contract, acquisition over time, mortgage or other instrument establishing a security interest to or by Contractor, that encumbers or limits Contractor's interest in Service Assets, including any replacement or substitute equipment,

will:

- (1) allow any guarantor of Contractor's obligations under this Agreement to assume Contractor's obligations and to continue use of Service Assets in performing Services;
- (2) allow any Contractor's surety to assume Contractor's obligations and to continue use of Service Assets in performing Services during the remaining term of surety's bond; and
- (3) allow City to assume Contractor's obligations and to continue use of Service Assets in performing Services.

C. Insurance. Contractor will maintain in full force and effect all insurance required in accordance with Section 11.01 during City's possession of Service Assets.

By granting City and Waste Generators the right to possession and use of Service Assets Contractor hereby declares as follows:

(1) City and Waste Generators are permitted users for purposes of liability insurance policies that Contractor must procure and maintain under this Agreement, and

(2) City and Waste Generators use and possession is not intended to be and is not transfer of ownership for purposes of any liability policies.

Furthermore, if City and Waste Generators have possession and use of Service Assets, Contractor will execute whatever documentation its liability insurers require in order to ensure that City and Waste Generators are protected and covered by Contractor's general and automobile policies, including requesting and executing endorsements to those policies, provided that Contractor is not obligated to pay any additional cost of those endorsements unless City reimburses Contractor for those costs. Contractor hereby gives City the right to pay for any endorsements, additional premiums or other costs. Contractor hereby gives City the right to call and confer with Contractor's insurance broker to determine what, if any, documentation or actions are necessary to achieve protection satisfactory to City, which right City may exercise only in the event of its use and possession of Service Assets. By executing this agreement, Contractor directs its insurance broker to cooperate with and take direction from City under those circumstances, which authorization Contractor may not rescind without City consent.

D. Notice. Notice of Contractor's failure, refusal or neglect to collect and transport Solid Waste may be given orally by telephone to Contractor at its principal office and is effective immediately. Written confirmation of oral notification must be sent to Contractor within 24 hours of giving oral notification.

**10.02 Temporary Possession for Service Interruptions
Caused by Events Beyond Contractors Control**

If as permitted by Section 10.01A City takes possession of any Service Asset, then in the event that Contractor's failure, refusal or inability to collect and transport any or all Solid Waste is caused by any of the events listed in Section 11.05 that excuse Contractor from performing its obligation under this Agreement, City will pay to Contractor (or Contractor's assignee, Comerica Bank-California under The Assignment of Lease Proceeds, Including All Payment of Lease Proceeds, Subordination of Interest, and Other Terms entered into among Comerica Bank-California, the City and Contractor as of December 28, 1992, appended as Attachment 10.02) the following amounts:

- (1) with respect to any vehicles listed on Exhibit A to the Vehicle Lease, the rental payments shown on Exhibit B to the Vehicle Lease; and
- (2) with respect to facilities used by Contractor to collect and transport Solid Waste under this Agreement, the reasonable rental value thereof

for the period of City's possession, but City is excused from any other obligation to pay Contractor monies under this Agreement for that period.

10.03 Temporary Possession for Service Interruptions Caused by Other Events

If as permitted by Section 10.01A City takes possession of any Service Assets, then in the event that Contractor's failure, refusal or inability to collect and transport any or all Solid Waste is caused by labor unrest (such as strikes, work stoppages or slowdown, sickout, lockouts, picketing or other concerted job action) or any event other than events listed in Section 11.05 that excuse Contractor from performing its obligations under this Agreement, then City is not obligated to pay to Contractor or any other person any rental, or any other charge or compensation whatsoever, except to Contractor's assignee, Comerica Bank-California described in Section 10.02, with respect to those vehicles described in item (1) of Section 10.02, the rental payments described in item (1) of Section 10.02.

10.04 Duration of City's Possession

City has no obligation to maintain possession of

Contractor's property and/or continue its use in collecting and transporting Solid Waste for any period of time and may at any time, in its sole discretion, relinquish possession to Contractor.

City's right to retain temporary possession of Contractor's property, and to provide Solid Waste collection services, continues until Contractor can demonstrate to City's satisfaction that it is ready, willing and able to resume such services.

ARTICLE 11 DEFAULT AND REMEDIES

11.01 Events of Default

All provisions of the Franchise and this Agreement to be performed by Contractor are considered material. Each of the following constitutes an event of default ("**Event of Default**") under this Agreement:

A. Contractor fails to perform its obligations under this Agreement and fails to cure such breach within 2 days of receiving notice from City specifying the breach except, with respect to failure to perform its obligations under Section 12.02 (Compliance with Law) within 60 days of Violation, as defined in Section 12.02;

B. Any representation or disclosure made to City by Contractor in connection with or as an inducement to entering into this Agreement or any future amendment to this Agreement, which proves to be false or misleading in any material respect as of the time such representation or disclosure is made, whether or not any such representation or disclosure appears as part of this Agreement;

C. There is a seizure or attachment of, or levy on, the operating equipment of Contractor, including without limit its vehicles, maintenance or office facilities, or any part thereof;

D. There is any termination or suspension of the transaction of business by Contractor, including without limit, due to labor unrest including strike, work stoppage or slowdown, sickout, picketing, or other concerted job action lasting more than 2 days;

E. Contractor files a voluntary petition for debt relief under any applicable bankruptcy, insolvency, debtor relief, or other similar law now or hereafter in effect, or consents to the appointment of or taking of possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or similar official) of Contractor for any part of Contractor's operating assets or any substantial part of Contractor's property, or makes any general assignment for the benefit of Contractor's creditors, or fails generally to pay Contractor's debts as they become due or takes any action in furtherance of any of the foregoing;

F. A court having jurisdiction enters a decree or order for relief in respect of Contractor, in any involuntary case brought under any bankruptcy, insolvency, debtor relief, or similar law now or hereafter in effect, or Contractor consents to or fails to oppose any such proceeding, or any such court enters a decree or order appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of Contractor or for any part of Contractor's operating equipment or assets, or orders the winding up or liquidation of the affairs of Contractor;

G. Contractor fails to provide reasonable assurances of performance as required under Section 11.07 by the time required by City.

H. Contractor incurs an Event of Default as defined in Section 8.01B of the Consent and First Amendment to Agreement between the City of Sunnyvale and Specialty Garbage and Refuse Service, Inc. for the Collection of Solid Waste dated as of the 17th day of December, 1992 by and among the City, Specialty Garbage and Refuse Service, Inc. and Contractor, for failure to perform obligations or covenants under Section 7.01 (Encumbrance of Properties) thereof.

I. Contractor breaches any provision of Section 12.05.

11.02 Right to Terminate Upon Default

Upon an Event of Default, City may terminate the Franchise and this Agreement upon a further 10 days notice without the need for any hearing, suit or legal action.

11.03 Possession of Property Upon Termination

A. In Event of Default. If City terminates this Agreement in accordance with Section 11.02, City may take possession of any and all of Contractor's Service Assets and use those Service Assets to collect and transport any Solid Waste generated within City. City may retain the possession of those Service Assets until other suitable arrangements can be made for the provision of Solid Waste collection services, including the grant of a franchise to another solid waste hauling company.

B. Upon Expiration of this Agreement. Within 2 weeks prior to the expiration of this Agreement, City may direct Contractor to transfer unencumbered free and clear title, ownership and other rights to use and possession (such as leasehold interests) and possession of all, but not part, of Service Assets (excluding land) to City, without encumbrance or lien other than those in existence as of the date Contractor executed the Extended and Second Restated Agreement simultaneously upon City payment of the aggregate net book value thereof (if any), depreciated on a straight line basis in accordance with Section C4b or Exhibit 8.03A. Within 2 weeks of City's notice and simultaneously with that payment, Contractor will fully effectuate that transfer. Waste Generators' possession of Containers will be deemed possession by City if necessary to exercise this right. CITY'S ACQUISITION RIGHTS SURVIVE THE EXPIRATION OF THIS AGREEMENT.

C. Records and Service Asset Documentation. Upon City direction, Contractor will furnish City with immediate access to Waste Generator subscription (including service and complaint information), routing, and all of its business records related to its billing of accounts for services that are not billed by City under Section 6.01A. Contractor will comply with its obligations with respect to Service Asset Documentation as defined in and in accordance with Section 10.01B.

D. Undepreciated Assets. Contractor has no right to recover amounts equal to any undepreciated asset value remaining upon expiration or earlier termination of this Agreement from City or Waste Generators. Neither City nor Waste Generators must compensate Contractor for that undepreciated asset value, except to the extent that value is reflected in the net book value of assets purchased by City at City's option in accordance with Section 11.03B.

11.04 City's Remedies Cumulative; Specific Performance

City's right to terminate the Contract under Section 11.02 and to take possession of Contractor's properties under Section 11.03 are not exclusive, and City's termination of this Agreement does not constitute an election of remedies. Instead, they are in addition to any and all other legal and equitable rights and remedies that City may have.

By virtue of the nature of this Agreement, the urgency of timely, continuous and high quality service, the lead time required to effect alternative service, and the rights granted by City to Contractor, the remedy of damages for a breach hereof by Contractor is inadequate and City is entitled to injunctive relief.

11.05 Excuse From Performance

The parties are excused from performing their respective obligations under this Agreement if they are prevented from so performing by reason of floods, earthquakes, other "acts of God," war, civil insurrection, riots, acts of any government (including judicial action), and other similar catastrophic events which are beyond the control of and not the fault of the party claiming excuse from performance hereunder. Labor unrest, including strike, work stoppage or slowdown, sickout, picketing, or other concerted job action is not an excuse from performance and Contractor will continue to provide service notwithstanding the occurrence of any or all of such events.

Within 2 days after the party claiming excuse from performance has given notice thereof to the other party, it will further give the other party notice of the facts constituting such cause and asserting its claim to excuse under this Section.

If either party validly exercises its rights under this Section, the parties hereby waive any claim against each other for any damages sustained thereby.

The partial or complete interruption or discontinuance of Contractor's services caused by one or more of the events described in this Section does not constitute an Event of Default under this Agreement. However, the existence of an excuse from Contractor's performance will not affect City's rights to perform services under Sections 10.01 and 10.02. Furthermore, if Contractor is excused from performing its

obligations under this Agreement for a period of 14 days or more, City may nevertheless, in its sole discretion, terminate this Agreement by giving 10 days notice. In that event of termination, the provisions of Section 11.03 will apply.

11.06 Relationship of Liquidated Damages to Right to Terminate

City's right to recover liquidated damages under Section 6.07 for Contractor's failure to meet the service performance standards does not preclude City from obtaining equitable relief for persistent failures to meet such standards nor from terminating this Agreement for such failures.

11.07 Right to Demand Assurances of Performance

If Contractor

- (1) suffers the imposition of liquidated damages under Section 6.07;
- (2) is the subject of any labor unrest including work stoppage or slowdown, sickout, picketing or other concerted job action;
- (3) appears in the reasonable judgment of City to be unable to regularly pay its bills as they become due; or
- (4) is the subject of a civil or criminal proceeding brought by a federal, state, regional or local agency for violation of an Environmental Law,

then at its option and in addition to all other remedies it may have, City may demand from Contractor reasonable assurances of timely and proper performance of this Agreement, in such form and substance as City may require. If Contractor fails or refuses to provide satisfactory assurances of timely and proper performance in the form and by the date required by City, such failure or refusal is an event of default for purposes of Section 11.01.

11.08 CNG Vehicles and Fueling

Contractor will comply with all provisions within Contractor's control of all agreements ("**Funding Agreements**") in the form presented by the Bay Area Air Quality Management District or other agency ("**Funding Agency**") to City, as those

Funding Agreements may be supplemented and amended by the Funding Agency. Contractor will comply with all Funding Agreements whose form presented by the Funding Agency is amended, with concurrence of the Funding Agency, if Contractor has reviewed and approved those amendments to Funding Agreements and agreements of other granting agencies, including the Funding Agreements listed in Exhibit 11.08 as it may be amended by City to reflect termination of existing Funding Agreements and additions of new ones.

Reference in this Section to "Funding Agreement" includes amended, supplemented or similar additional agreements. Specific citations to the Funding Agreement include comparable provisions in those agreements.

Contractor will not sell any refuse truck identified in any Funding Agreement purchased as part of the project described in any Funding Agreement, without consent of City. City may condition that consent, including payment of funds to the Funding Agency necessary in the judgment of the Funding Agency to comply with any provision of the Funding Agreement. Contractor will operate those refuse trucks only inside the areas prescribed in the Funding Agreements until date provided in any Funding Agreement. Contractor will maintain fueling station requirements, including public throughput of therms, in accordance with the Funding Agreement.

Contractor will promptly provide City upon City request contracts between Contractor and fuel vendors for provision of fuel to collection vehicles or any other related goods, services or benefits accruing to Contractor. Contractor will secure City approval of any amendments thereto or any additional fuel contracts in advance of entering into those amendments or additions.

Contractor's obligations described in this Section survive the expiration or earlier termination of this agreement, and Contractor acknowledges that City may specifically enforce those obligations.

ARTICLE 12 OTHER AGREEMENTS OF THE PARTIES

12.01 Relationship of Parties

The parties intend that Contractor will perform the services required by this Agreement as an independent contractor

engaged by City and not as an officer or employee of City nor as a partner of or joint venturer with City. No employee or agent or Contractor is, or may be deemed to be, an employee or agent of City. Except as expressly provided in this Agreement, Contractor has the exclusive control over the manner and means of conducting the solid waste collection services performed under this Agreement, and all persons performing such services. Contractor is solely responsible for the acts and omissions of its officers, employees, subcontractors and agents. Neither Contractor nor any of its officers, employees, subcontractors and agents may obtain any rights to retirement benefits, workers' compensation benefits, or any other benefits that accrue to City employees by virtue of their employment with City.

12.02 Compliance with Law

In providing the services required under this Agreement, Contractor will at all times, at its sole cost, comply with all applicable laws of the United States, the State of California and City and with all applicable regulations promulgated by federal, state, regional or local administrative and regulatory agencies, now in force and as they may be enacted, issued or amended during the Term.

If Contractor is determined, in a final decision by the National Labor Relations Board or a court, to have engaged in unfair labor practices in violation of the National Labor Relations Act, as amended, 29 U.S.C. Section 158, et seq., which have occurred during the Term of this Agreement, City may terminate the Franchise and this Agreement upon 10 days' notice, without the need for any hearing, suit, or legal action.

The enumeration of City's right to terminate in the immediately preceding paragraph is not in derogation of City's right to treat Contractor's Violation of other laws as an Event of Default under Section 11.01, for purposes of Section 11.02.

"Violation" means:

- (1) any written notice, assessment or determination of non-compliance with Environmental Law, or
- (2) any written notice, assessment or determination of material non-compliance with other applicable law described in the first paragraph of this Section,

from any Regulatory Agency to Contractor, whether or not a fine or penalty is included, assessed, levied or attached, where "Regulatory Agency" means any federal, State or local governmental agency that regulates collection and transportation of Solid Waste, including California Department of Transportation, California Department of Motor Vehicles, EDD, U.S. Immigration and Naturalization Services, or other health and safety department thereof, and the Local Enforcement Agency applicable to services under this Agreement.

12.03 Governing Law

This Agreement is governed by, and construed and enforced in accordance with, the laws of the State of California.

12.04 Jurisdiction

Any lawsuits between the parties arising out of this Agreement must be brought and concluded in the courts of the State of California, which has exclusive jurisdiction over such lawsuits.

With respect to venue, this Agreement is made in and will be performed in Santa Clara County.

12.05 Assignment

A. Assignment Consent. Except as provided in Section 12.06, neither party may assign its rights nor delegate or otherwise transfer its obligations under this Agreement to any other person without the prior consent of the other party, where "assign" and "assignment" is defined in this Section below. This assignment provision is material in accordance with Section 11.01. Any assignment made without the consent of the other party is void and the attempted assignment by Contractor constitutes an Event of Default under Section 11.01.

B. Definition of "Assign" and "Assignment". For purposes of this Section, "assign" or "assignment" includes, but is not limited to,

(i) any sale, exchange or other transfer of substantially all of

Contractor's assets dedicated to service under this Agreement to a third party;

(ii) any issuance of new stock to a person *other than any of the* shareholders of Contractor identified to City as of the date of execution by Contractor of this Extended and Second Restated Agreement, as represented and warranted to City by Contractor as of that date; and any sales, exchanges and/or other transfers of 10% or more of the common stock of Contractor outstanding as of that date *other than* between any of those shareholders;

(iii) any dissolution, reorganization, consolidation, merger, recapitalization, stock issuance or reissuance, voting trust, pooling agreement, escrow arrangement, liquidation or other transaction to which Contractor or any of its shareholders is a party which results in a change of ownership or control of 10% or more of the value or voting rights in the stock of Contractor (provided that changes in ownership or control between the shareholders named in item (ii) do not constitute assignments);

(iv) any assignment by operation of law, including:

- insolvency or bankruptcy;
- making assignment for the benefit of creditors;
- writ of attachment of an execution being levied against Contractor;
- appointment of a receiver; and
- taking possession of any of Contractor's tangible or intangible property;

(v) substitution by a surety company providing any performance bond of another person for Contractor to perform services;

(vi) any combination of the foregoing (whether or not in related or contemporaneous transactions) which has the effect of any such transfer or change of ownership, management or control,

(vii) transfer of stock or other ownership interest in Contractor by a personal representative of the transferor following the death or incapacity of the transferor to a person other than a child or other issue of the transferor;

(ix) "assignment" as defined in preceding items (i) - (viii) of or by an Affiliate that provides Goods or Services to Contractor, where **"Goods or Services"** means all goods or services used in providing Services, including labor, leases (other than the land lease by Contractor of the site of its

operations and maintenance facility), subleases, equipment, supplies and capital related to furnishing Services; insurance, bonds or other credit support if the insurer is an Affiliate or a captive of Contractor or any Affiliate; and legal, risk management, general and administrative services. (For example, if Contractor leased its vehicle fleet from an Affiliate, and more than 10% of the stock of the Affiliate was sold, that sale would constitute an "assignment".)

Despite the preceding definition of "assign" and "assignment", the terms "assign" and "assignment" do not include any transfer of stock or other ownership interest in Contractor:

(i) by a transferor in his or her individual name to the transferor and his or her spouse, as trustee(s) of a revocable trust for the benefit of such transferor and spouse;

(ii) to a child or other issue of the transferor by reason of the death or disability of the transferor where it is established to the satisfaction of City that the transferee has been active in the business on a substantially full-time basis prior to such transfer;

(iii) to a personal representative of the transferor by reason of the death or incapacity of the transferor, but only for such period as is reasonably necessary to arrange for the disposition of such interest.

C. Acknowledgements. Contractor acknowledges that this Agreement involves rendering a vital service to City's residents and businesses, and that City has selected Contractor to perform the services specified in this Agreement based on (1) Contractor's experience, skill and reputation for conducting its solid waste management operations in a safe, effective and responsible fashion, at all times in keeping with applicable solid waste management laws, regulations and good solid waste management practices, and (2) Contractor's financial resources to maintain the required equipment and to support its indemnity obligations to City under this Agreement. City has relied on each of these factors, among others, in choosing Contractor to perform the services to be rendered by Contractor under this Agreement.

D. Requests for Assignment. If Contractor requests City's consideration of and consent to an assignment, City may deny or approve Contractor's request in City's complete discretion. Contractor will submit its request for City consent

to City together with any documentation City may request, including audited financial statements. City is not obligated to consider any proposed Assignment by Contractor if Contractor is in breach of this Agreement at any time during the period of City's consideration. Contractor will make any request for consent to Assignment in the form and manner prescribed by City.

E. Assignment Fee and Cost Reimbursement. Together with submitting to City its request for Assignment, Contractor will compensate City in the minimum, a non-refundable amount of a \$10,000 assignment fee. Contractor will thereafter pay City any additional reasonable Direct Costs incurred by City in excess of that amount for considering Contractor's request for Assignment, incurred by City to determine whether or not it is in the public interest to approve Contractor's request for Assignment, investigate the suitability of any proposed assignee and to review, prepare and finalize any documentation required by City as a condition of City approval. For purposes of this Section, the term "**proposed assignee**" refers to the proposed transferee(s) or other successor(s) in interest pursuant to the Assignment. "**Direct Costs**" include wages (including benefits) of City staff; the costs of materials, support services, and supplies (such as mailing and courier fees, phone charges, fees to access financial and other reported information); and payments to subcontractors, consultants, attorneys, accountants and other professionals having expertise in solid waste industry and service contracting.

F. Enforcement Cost Reimbursement. Contractor will further pay City the reasonable Direct Costs defined in preceding subsection 12.05E incurred by City to enjoin Contractor's Assignment without City consent or otherwise enforce this provision within 30 days of City's request for that payment. Those Direct Costs include fees of attorneys, consultants and expert witnesses, exhibit preparation and court costs of preparing for, prosecuting, defending or otherwise conducting mediation, arbitration or judicial proceedings.

12.06 Subcontracting

Contractor will not engage any subcontractors without the prior consent of City, except for those whom Contractor has identified in writing to City prior to engaging their services. Contractor may engage a subcontractor that is an Affiliate of Contractor only if Contractor has first solicited bids in good faith from 3 subcontractors that are not Affiliates, and

Contractor's Affiliate submits the lowest bid for substantially the same services as covered by the competitive bids.

12.07 Binding on Successors

The provisions of this Agreement inure to the benefit of and are binding on the successors and permitted assigns of the parties.

12.08 Parties in Interest

Nothing in this Agreement, whether express or implied, is intended to confer any rights on any persons other than the parties to it and their representatives, successors and permitted assigns.

12.09 Waiver

The waiver by either party of any breach or violation of any provisions of this Agreement will not be deemed to be a waiver of any breach or violation of any other provision nor of any subsequent breach or violation of the same or any other provision. The subsequent acceptance by either party of any monies that become due hereunder will not be deemed to be a waiver of any pre-existing or concurrent breach or violation by the other party of any provision of this Agreement.

12.10 Contractor's Investigation

Contractor represents and warrants that it is familiar with the number and type of Waste Generators in City and the nature of the Solid Waste generated.

12.11 Condemnation

Contractor acknowledges that this Agreement implements the grant of a franchise pursuant to Article XVI of the Sunnyvale City Charter and Section 8.16.090 of the Sunnyvale Municipal Code. City fully reserves the rights to acquire Contractor's property utilized in the performance of this Agreement, by purchase or through the exercise of the right of eminent domain, in accordance with the procedure described in Section 1605 of

City Charter. Contractor agrees that, pursuant to Section 1605 of the City Charter, in fixing the price to be paid, the court must value the property to be acquired at its fair market value, except that no allowance be made for franchise value, good will, going concern, earning power, or increased value of right of way.

12.12 Notice

All notices, demands, requests, proposals, approvals, consents and other communications that this Agreement requires, authorizes or contemplates must, except as provided in Section 10.01, be in writing and must either be personally delivered to a representative of the parties at the address below or be deposited in the United States mail, first class postage prepaid, addressed as follows:

If to City: City Manager
 City of Sunnyvale
 456 West Olive Avenue
 Sunnyvale, California 94086

with a copy to:

City Attorney
City of Sunnyvale
456 West Olive Avenue
Sunnyvale, California 94086

If to Contractor: Bay Counties Waste Services, Inc.
 3355 Thomas Road
 Santa Clara, CA 95054
 Attention: President

with a copy to:

David Cohen, Esq.
Cohen & Ostler
525 University Avenue, Suite 410
Palo Alto, CA 94301

The address to which communications may be delivered may be changed from time to time by a notice given in accordance with this Section.

Notice is deemed given on the day it is personally

delivered or, if mailed, three days from the date it is deposited in the mail.

12.13 Representatives of the Parties

References in this Agreement to "City" means the City Council and all actions to be taken by City mean actions taken by the City Council except as provided below. The City Council may delegate, in writing, authority to the City Manager, the Director of the Department of Public Works and/or to other City officials and may permit those officials, in turn, to delegate in writing some or all of such authority to subordinate officers. Contractor may rely upon actions taken by such delegates if they are within the scope of the authority properly delegated to them.

Contractor will designate in writing a responsible officer who will serve as the representative of Contractor in all matters related to this Agreement and will inform City in writing of such designation and of any limitations upon his or her authority to bind Contractor. City may rely upon action taken by such designated representative as actions of Contractor unless it is outside the scope of the authority delegated to him/her by Contractor as communicated to City. Contractor will use best efforts to provide City with notice of change in this designation no later than 30 days prior thereto, including the professional qualifications of the person Contractor proposes to newly designate.

ARTICLE 13 MISCELLANEOUS AGREEMENTS

13.01 Exhibits

Each of the Exhibits identified by the title "Exhibits" and a number matching the Section that it references or other distinguishing letter, is attached to this Agreement, incorporated in this Agreement and made a part of this Agreement by this reference, whether or not they are mentioned or specifically referred to in any other Section of this Agreement.

13.02 Entire Agreement

This Agreement, including the Exhibits, represents the full and entire Agreement between the parties with respect to the

matters covered in this Agreement.

13.03 Section Headings

The article headings and section headings in this Agreement are for convenience of reference only and are not intended to be used in the construction of this Agreement nor to alter or affect any of its provisions. References to numbered Sections in this Agreement and its Exhibits refer to Sections in this Agreement, unless otherwise referenced. Reference to a subsection is to the Section in which that subsection occurs. For example, reference to subsection A in the body of Section 6.01 would be to Section 6.01A.

13.04 References to Laws

Reference to laws includes all rules and regulations promulgated under those laws as well as all future amendments to or recodifications / restatements of those laws.

13.05 Interpretation

This Agreement must be interpreted and construed reasonably and neither for nor against either party, regardless of the degree to which either party participated in its drafting.

Use of the word "including," "includes" or other forms thereof means "including, without limitation," "including, but not limited to" and "including, at a minimum."

Use of the word "may" includes "is not obligated."

Failure of either party to exercise its right to approve or disapprove any item will not be deemed a breach of an obligation.

13.06 Amendment

This Agreement may not be modified or amended in any respect except by a writing signed by the parties.

13.07 Severability

If any non-material provision of this Agreement is for any reason deemed to be invalid and unenforceable, the invalidity or unenforceability of such provision will not affect any of the remaining provisions of this Agreement, which will be enforced as if such invalid or unenforceable provision had not been contained in this Agreement. Determination of materiality with respect to this Section does not derogate the materiality with respect to all other provisions for the purpose of, and in accordance with, Section 11.01.

13.08 Counterparts

This Agreement may be executed in counterparts each of which is considered an original.

IN WITNESS WHEREOF, City and Contractor originally executed this Agreement as of the day and year first above written and have executed this Amended and Second Restated Agreement as of the day and year first above written.

ATTEST:

CITY CLERK
by

CITY OF SUNNYVALE ("City"),

By: _____
City Clerk

Mayor

APPROVED AS TO FORM:

City Attorney

Dec 08 04 08:39a

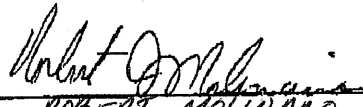
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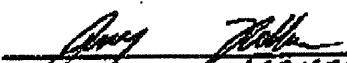
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BAY COUNTIES WASTE SERVICES,
INC.

By:


Name: ROBERT MOLINARO
Title: Pres.

ATTEST name and signature:


Name: PERRY NABHAN

Corporate Secretary or other title:

